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Supreme Court, U.S.
FILED
MAY 14 2001

No. 01-65

In The
Supreme Court of the United States
October Term, 2000

THOMAS E. HEMPFLING, JR.,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

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Attorney for Petitioner

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29 pp

QUESTION PRESENTED

1. WHETHER THE TRIAL COURT, IN SENTENCING, ERRED BY FINDING AND CONSIDERING THAT THE OFFENSE INVOLVED A LARGER AMOUNT OF DRUGS THAN THAT WHICH THE JURY FOUND DURING THE GUILT/INNOCENCE PHASE OF TRIAL.

LIST OF PARTIES TO THE PROCEEDING

Thomas E. Hempfling, Jr. was represented at trial, and currently on appeal, by Jimmy Parks. The United States is represented on appeal by Assistant United States Attorney Margaret Leachman. The attorney for the United States at trial was Charlie Strauss. In this Cause No. 00-50202, *Thomas E. Hempfling, Jr. v. United States of America*, on appeal from the United States Court of Appeals for the Fifth Circuit, the undersigned counsel on appeal certifies that the following persons also have an interest in this case:

1. Thomas E. Hempfling, Jr. who is incarcerated.

The undersigned counsel of record certifies that he is aware of no persons other than those listed who have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINION BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 6

PRAYER 7

APPENDIX

Opinion of Court of Appeals ..... App. 1

Judgment of the District Court ..... App. 3

Presentence Investigation Report
(partial) ..... App. 10

Relevant statutes ..... App. 14

TABLE OF CITED AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. __, 120 S.Ct. 2348,
147 L.Ed.2d 435 (June 26, 2000) 20

Jones v. United States, 526 U.S. 227, 88 S.Ct. 254,
19 L.Ed.2d 336 (1999) 19

United States v. Sheppard, 00-1218, 2000 WL 988127
(8th Cir. 1986) 14

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837,
51 L.Ed.2d 30 (1977) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Sentencing Commission,
Guidelines Manual, §2D1.1 (Nov. 1998) 3

OPINION BELOW

The opinion of the Court of Appeals below has not been designated for publication. It is reproduced in the Appendix at App. 1.

BASIS OF JURISDICTION

This Court has jurisdiction to review on a writ of certiorari the judgment in question because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter, and because the United States District Court has so far departed from the accepted and usual course of judicial proceedings, and the United States Court of Appeals for the Fifth Circuit has sanctioned such departure, so as to call for an exercise of this Court's supervisory power. The basis for jurisdiction in the U. S. Court of Appeals for the Fifth Circuit is Rules 3 and 4(b), Federal Rules of Appellate Procedure. Jurisdiction in the U. S. District Court was established by a three-count indictment for felony violations of 21 U.S.C. 841(a)(1), 21 U.S.C. 846, Conspiracy to manufacture and distribute in

excess of 500 grams of methamphetamine; 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, manufacture of in excess of 50 grams of methamphetamine; and 21 U.S.C. 841(d)(1) and 18 U.S.C. 2, possession of a listed chemical with intent to manufacture methamphetamine. Hempfling was convicted by a jury on December 1, 1999, and judgment of conviction and sentence were entered on March 1, 2000. Notice of Appeal was timely filed on March 9, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(The pertinent text for each citation below is set out in the Appendix beginning at App. 15.)

United States Sentencing Commission, *Guidelines Manual*, §2D1.1 (Nov. 1998)

18 U.S.C. §2

21 U.S.C. §841(a)(1)

21 U.S.C. §841(d)(1)

21 U.S.C. §846

STATEMENT OF THE CASE

Thomas E. Hempfling, Jr. was indicted in Cause Number SA-99-CR-202 in the Western District of Texas. Hempfling was charged with conspiracy to manufacture and distribute in excess of 500 grams of methamphetamine under Title 21 U.S.C. 841(a)(1) and Title 21 U.S.C. 846, manufacturing in excess of 50 grams of methamphetamine under Title 21 U.S.C. 841(a)(1) and Title 18 U.S.C. 2, and possession of ephedrine with the intent to manufacture methamphetamine under Title 21 U.S.C. 841(d)(1) and Title 18 U.S.C. 2. On December 1, 1999, a jury trial was had. Hempfling was found guilty on all three counts. On March 1, 2000, Hempfling was sentenced by the Court to imprisonment for two hundred ten (210) months, five years supervised release and a $300.00 special assessment. (5 R. 464).

A search warrant was executed at the home of Edgar Anderson. (3 R. 68-69). Police found a quantity of methamphetamine and various chemicals and paraphernalia associated with its manufacture. (3 R. 71-77; 85) Upon being arrested, Anderson told police that he, Schoening and another person, appellant Hempfling, had been manufacturing

methamphetamine at his house.

Hempfling was arrested subsequent to being indicted. Anderson and Schoening were charged by separate indictments. At Hempfling's trial, Schoening testified against Hempfling, stating that they had manufactured methamphetamine together. (3 R. 122). Hempfling was found guilty by a jury of the three counts of the indictment against him.

REASONS FOR GRANTING THE WRIT

IN SENTENCING HEMPFLING, THE TRIAL COURT SHOULD NOT HAVE FOUND AND CONSIDERED THAT THE OFFENSE INVOLVED A LARGER AMOUNT OF DRUGS THAN THAT WHICH THE JURY FOUND DURING THE GUILT/INNOCENCE PHASE OF TRIAL.

The standard of review is abuse of discretion. A defendant is entitled to fairness under the due process clause of the Constitution, not only in plea negotiations, but in the securing of the deal. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977).

In sentencing Hempfling, the trial court relied upon the sentencing guidelines as given in the Presentence Report. In Paragraph 18 of the Presentence Report, the United States Probation Office gave a computation of the Base Offense Level based upon the quantity of controlled substances involved. The computation assumed the largest possible quantity of methamphetamine that could have been made given the chemicals seized during the execution of the search warrant. According to the calculations, the total amount of methamphetamine produced during the conspiracy was 1,550.64 grams, or 1.55 kilograms.

The indictment charged Hempfling with offenses involving "in excess of 500 grams" and "in excess of 50 grams". These amounts were given to the jury in its instructions. These quantities are elements of the offense with which the jury was presented at trial. The jury was not

asked to decide whether Hempfling committed offenses involving 1,550.64 grams.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (June 26, 2000), has recently stated as a firm constitutional rule, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". *See also*, *Jones v. United States*, 526 U.S. 227, 88 S.Ct. 254, 19 L.Ed.2d 336 (1999). Therefore, Hempfling asserts that since no factual determination was made by the jury as to the total amount of drugs; based upon the reasoning in *Apprendi* and *United States v. Sheppard*, 00-1218, 2000 WL 988127 (8th Cir.), the court should have authority to only consider the amount of drugs submitted to and found by the jury. Hempfling respectfully requests this court remand this case for re-sentencing in accordance with the afore stated opinions.

CONCLUSION

The judgment against THOMAS E. HEMPFLING, JR. should be reversed and remanded because the trial Court sentenced Hempfling according to a larger amount of drugs than was found by the jury to have been involved.

PRAYER

Petitioner respectfully prays that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50202
Conference Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS E. HEMPFLING,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-99-CR-202-1-FB

[Opinion filed: February 14, 2001;
Judgment entered: March 8, 2001
Judgment filed in U.S. District Court: March 12, 2001]

Before SMITH, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:*

Thomas Hempfling ("Hempfling") was convicted of

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

conspiracy to manufacture and distribute in excess of 500 grams of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 846, aiding and abetting and manufacture of in excess of 50 grams of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a) (1) and 18 U.S.C. § 2, and aiding and abetting and possession of a listed chemical with the intent to manufacture methamphetamine, in violation of 21 U.S.C. § 841(d) (1) and 18 U.S.C. § 2. He argues that (1) his sentence was unconstitutional in light of Apprendi v.New Jersey, 530 U.S. 466 (2000), and (2) permitting the testimony of a witness who received a favorable plea agreement in exchange for his testimony violated 18 U.S.C. § 201 (b) (3).

Hempfling did not raise his arguments before the district court. Accordingly, review is for plain error. See United States v. Meshack, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, ___ S.Ct. ___ (U.S. Jan. 8, 2001), 2001 WL 13025; United States v. Haese, 162 F.3d 359, 366 (5th Cir. 1998).

The district court committed no errors, plain or otherwise. Hempfling's sentence was not unconstitutional in light of Apprendi. See United States v. Doggett, 230 F.3d 160, 165-66 (5th Cir. 2000), petition for cert. filed, (U.S. Jan. 4, 2001) (No. 00-7819). Permitting the testimony of a witness who received a favorable plea agreement in exchange for his testimony did not violate 18 U.S.C. § 201(b) (3). See United States v. Haese, 162 F.3d 359, 366-68 (5th Cir. 1998). The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
v.
THOMAS EUGENE HEMPFLING, JR.
aka: Thomas E. Hempfling, Jr.;
Thomas Hempfling, Jr.; Tom; Tommy
Defendant.

Case Number SA-99-CR-202(01)FB
USAO Number 1999RO3554

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, THOMAS EUGENE HEMPFLING, JR., aka: Thomas E. Hempfling, Jr., was represented by Jimmy Byston Parks, Jr.

The defendant was found guilty on Count(s) 1, 2, and 3 by a jury verdict on December 1, 1999 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section 21 USC 841(a)(1) and
21 USC 846
Nature of Offense Conspiracy to Manufacture and
Distribute Methamphetamine
Date of Offense date in 1998 until on or about September
23, 1998

Count Number(s) 1

Title & Section 21 USC 841(a)(1) and 18 USC 2
Nature of Offense Manufacture of a Detectable Quantity of Methamphetamine; Aiding and Abetting
Date of Offense June or July of 1998
Count Number(s) 2

Title & Section 21 USC 841(d)(1) and 18 USC 2
Nature of Offense Possession of Ephedrine with Intent to Manufacture Methamphetamine; Aiding and Abetting
Date of Offense September 23, 1998
Count Number(s) 3

As pronounced on March 1, 2000, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $300.00, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 1st day of March, 2000.

Defendant's SSN: 451-08-6727
Defendant's Date of Birth: January 19, 1967
Defendant's address: 12624 Old Spanish Trail, Live Oak, TX 78233

/s/_____
FRED BIERY
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months, on each of Counts 1, 2, and 3, to be served concurrently, with credit for time served while in custody for this offense.

The Court makes the following recommendations to the Bureau of Prisons:

(a) that the defendant be incarcerated in a federal facility in Beaumont, Texas or as close to San Antonio, Texas as possible.

(b) that the defendant be evaluated for and permitted to attend the 500 - Hour Intensive Drug Abuse Education Program.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to

_____ at _____,

with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years on Count 1, 4 years on Count 2, and 3 years on Count 3, to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the District to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall pay any special assessment balance that remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the Court.

X The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the Probation Officer.

X The defendant shall participate in a program approved by the Probation Officer for treatment of narcotic addition [sic] or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the Probation Officer, based on the defendant's ability to pay.

X The defendant shall pay for and participate in the Family Violence Prevention Services, Inc. program for the treatment of domestic abuse as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a

controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with a schedule to be approved by the Court. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is release within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm as defined in 18 U.S.C. §921.

6) For offense committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

7) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

8) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

9) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

10) The defendant shall support his or her dependents

and meet other family responsibilities.

11) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

12) The defendant shall notify the Probation Officer ten days prior to any change in residence or employment.

13) The defendant shall refrain from excessive use of alcohol.

14) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

15) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

16) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

17) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

18) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

19) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and

to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	34
Criminal History Category:	IV
Imprisonment Range:	210 months to 262 months
Supervised Release Range:	5 years on Count 1; 4 years on Count 2; not more than 3 years on Count 3
Fine Range:	$ 17,500 to $ 6,000,000
Restitution:	$ 0

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following rea-son(s): To achieve the sentencing objectives of punishment, deterrence, and incapacitation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

vs.

THOMAS HEMPFLING, JR.

PRESENTENCE INVESTIGATION REPORT

Docket No. SA-99-CR-202-01-FB

...

PART A. THE OFFENSE

The Offense Conduct

...

[Paragraph] 9. Schoening stated that on the first two occasions, he and **Hempfling** manufactured methamphetamine at the Ace Repair Shop. They experimented and made from three to seven grams of methamphetamine. On the third occasion, they produced approximately one ounce (28.35 grams) of methamphetamine at **Hempfling's** house. The next manufacturing processes occurred at the Ace Repair Shop on five to seven occasions. Schoening testified that the total amount of methamphetamine produced during those

cooks was seven ounces (198.45 grams). The next production of methamphetamine occurred at Edgar Anderson's house in the summer of 1998, in approximately June or July 1998. Schoening, **Hempfling**, and Anderson were present at the cooks. Schoening stated there were six or seven cooks at Anderson's house. On each occasion, they produced approximately six ounces (170.1 grams). The total of the six cooks would have produced 1,020.6 grams of methamphetamine.

...

[Paragraph] 11. The amounts of methamphetamine produced by Schoening, **Hempfling**, and Anderson between March and July 1998 total **1253.4 grams of methamphetamine**. Pursuant to the chemicals seized at the home of Edgar Anderson on September 23, 1998, the following conversions were used: **a)** 288 bottles containing 60 tablets each of ephedrine weighing 25 milligrams equals 17,280 tablets or 432 grams of ephedrine; **b)** one bottle of ephedrine containing 100 tablets, weighing 25 milligrams equals 2.5 grams of ephedrine; **c)** six packets of sudafed containing 24 tablets each weighing 60 milligrams equals 144 tablets or 8.64 grams of pseudoephedrine (which converts to 8.64 grams of ephedrine). The total of ephedrine equals 443.14 grams. The total grams of ephedrine (times a conversion factor of 65%) would produce 288.04 grams of methamphetamine. Adding 9.2 grams of methamphetamine seized at Anderson's house to the methamphetamine which would have been produced from the pseudoephedrine and ephedrine tablets totals **297.24 grams of methamphetamine. The amount of**

methamphetamine which will be used to compute Thomas Hempfling's base offense level equals 1550.64 grams or 1.55 kilograms of methamphetamine.

[emphasis in original]

...

Offense Level Computation

[Paragraph] 16. The 1998 edition of the Guidelines Manual has been used in this case.

[Paragraph] 17. Counts One, Two, and Three were grouped pursuant to USSG §3D1.2(d) because of the quantity of substance involved. In determining the appropriate guideline for the listed chemicals in this case, the probation officer converted the pseudoephedrine to its ephedrine equivalent which has a one-to-one rate (see USSG §2D1.11(d)(E)). The ephedrine equivalents were added together to produce a total ephedrine equivalent. According to the Drug Enforcement Administration chemist, a yield factor in converting pseudoephedrine to methamphetamine would be .650 or 65%.

[Paragraph] 18. **Base Offense Level**: The guideline for 21 U.S.C. §§ 841(a)(1) and 846 offenses is found in USSG §2D1.1. The guideline for a 21 U.S.C. §§ 841(d)(1) offense is found in USSG §2D1.11. However, the cross reference in USSG §2D1.11(c)(1) indicates that if the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled

substance unlawfully, USSG §2D1.1 is to be applied if the resulting offense level is greater than that determined by applying USSG §2D1.11. In this case, the guideline at USSG §2D1.1 produces a greater offense level than USSG §2D1.11. The total amount of methamphetamine produced during the conspiracy was 1550.64 grams or 1.55 kilograms. USSG §2D1.1(c)(3) indicates that offenses involving at least 1.5 kilograms but less than 5 kilograms of methamphetamine establish a base offense level of 34.

...

PART D. SENTENCING OPTIONS

Custody

...

[Paragraph] 69. **Guideline Provisions**: Based upon a total offense level of 34 and a criminal history category of IV, the guideline imprisonment range is 210 to 262 months. Chapter 5, Part A.

RELEVANT STATUTES

United States Sentencing Commission, *Guidelines Manual*, §2D1.1:

"Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

...

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity Base Offense Level

...

(3) ...At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), ...

Level 34"

18 U.S.C. §2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

21 U.S.C. §841(a)(1):

"Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;..."

21 U.S.C. §841(d)(1):

"(d) Offenses involving listed chemicals

Any person who knowingly or intentionally-

(1) possesses a listed chemical with intent to

manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both."

21 U.S.C. §846. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."